

The logic behind not applying the SMATV cross-ownership prohibition within the franchise area but outside that portion of the franchise area actually served by a cable operator is simple: construction of stand-alone SMATV systems serving multiple unit dwellings or private developments within the franchise area but outside the area served is an efficient and expedient method of extending cable service into unserved areas. As evidenced by the implicit and explicit limitations on the cross-ownership prohibitions, Congress certainly did not intend that service to such outlying pockets be delayed until intervening areas of low or no density could economically be constructed. Furthermore, a cable operator's ability to serve such areas efficiently should not turn on a requirement that the area served be reached by means of a hardwire crossing of public rights-of-way. Where the goal is the efficient distribution of video programming service to the maximum number of recipients possible, any reading of the statute as prohibiting cable operators from constructing SMATV systems in the unserved portions of their cable franchise areas would pose an undue restriction upon the discretion of cable operators to extend their service areas in the most economical fashion and would disserve the public.

- C. The Commission's existing public interest waiver standard for cable/MMDS is sufficient to ensure that all significant portions of a franchise area are able to obtain video programming, and should be extended to cable/SMATV.

The cable/MMDS cross-ownership restrictions are the result of the Commission's endeavors to encourage the expansion and

development of the wireless cable industry.<sup>97</sup> The Commission has acknowledged, however, that in certain circumstances a waiver of these cross-ownership rules would serve the public interest.<sup>98</sup> These same considerations require extension of the cable/MMDS public interest waiver standard to cable/SMATV.

In instances in which the Commission is faced with the question of whether to allow a cable operator to provide SMATV service within its service area, allowing cable operators to apply for a waiver of the cross-ownership rules provides an efficient and appropriate means for the Commission to address new or extended service opportunities. The waiver approach also allows the Commission to assess the relevant factors bearing upon the necessity for a cable operator to establish service within its franchise by means other than a direct hardwire connection and permits the Commission to grant or deny on a case-by-case basis cable operators' requests to construct SMATV operations within their franchise areas in those instances where the cross-ownership prohibition would otherwise apply.

A waiver process would allow the Commission to give reasoned consideration to individual circumstances in light of not only the factors relating to the cable operator's need for such an operation, but also the competitive environment in the area in question and the interest of the franchising authorities in

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<sup>97</sup>See Wireless I, 5 FCC Rcd 6410 at ¶ 42.

<sup>98</sup>See Wireless II, 6 FCC Rcd 6792 at ¶ 37.

maintaining regulatory control over that service. Furthermore, in judging the request for a waiver of the SMATV cross-ownership prohibition, the Commission would be required to determine whether grant of the request would serve the public interest or would undermine the policy that the rule was intended to serve.<sup>99</sup> In sum, extending the cable/MMDS public interest waiver standard to cable/SMATV would serve the goal of reducing that portion of the public presently lacking video programming service while making certain that competition between distributors of such programming is not unnecessarily reduced.

#### CONCLUSION

The rationale for the three year holding requirement is uncertain. The 1992 Cable Act will result in pervasive regulation of most cable systems, effectively precluding "profiteering" from "trafficking". Accordingly, the three year holding requirement should be applied only in limited circumstances. Moreover, only the Commission should interpret and enforce the antitrafficking provisions in order to ensure their fair and consistent application.

Congress has preemptively established 120 days as a reasonable time for franchising authorities to act upon a request for any necessary approval of a cable system assignment or transfer. The Commission must preemptively establish the

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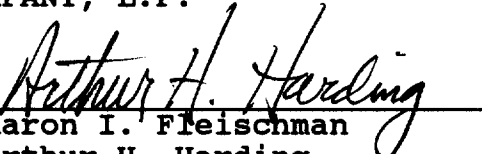
<sup>99</sup>See WAIT Radio, Inc., 418 F.2d at 1157.

information which, when filed with such requests, will initiate the 120 day clock.

The Commission's present cable MMDS cross-ownership regulations effectively implement the 1992 Cable Act's prohibitions. The cable/SMATV prohibition applies to limited cases of SMATV service. The Commission should retain, and extend to cable/SMATV cross-ownership, its existing waiver standards for cable/MMDS cross-ownership.

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